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# ***PARENS PATRIAE: PROTECTING OUR CHILDREN OR CROSSING THE LINE? THE LINGERING SMOKE DEBATE***

BY TONIA ETTINGER

## **INTRODUCTION**

Smoking is a normal and legal habit for millions of Americans. Many light up without any concern to the effect environmental tobacco smoke (ETS) or second-hand smoke will have on those around them. While many nonsmokers often have the option of leaving the room or building, the same cannot be said for children who live in homes with smokers. In 1988, it was estimated that approximately seventy percent of United States children reside in homes with at least one smoker.<sup>1</sup> With new scientific studies, the effects of ETS is well documented and is the third leading cause of preventable death in the United States, killing over 53,000 Americans each year.<sup>2</sup>

Cigarette smoke contains as many as 4,000 distinct substances, "approximately four dozen of which are carcinogenic."<sup>3</sup> A single cigarette infuses "approximately seventy milligrams of dry particulate matter and twenty- three milligrams of carbon monoxide" into the air.<sup>4</sup> When smoking occurs in enclosed areas, such as a house or automobile, these particles have little place to go and unfortunately end up in the lungs of unsuspecting children. Sadly, each year 280 children die from respiratory problems caused by ETS.<sup>5</sup> Even more alarming is that second-hand smoke causes more than "500,000 physician visits for

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<sup>1</sup> Jonathan E. Fielding & Kenneth J. Phenow, *Health Effects of Involuntary Smoking*, 319 NEW ENG. J. MED. 1452, 1452 (1988).

<sup>2</sup> Thomas P. Houston, *The Silent Killer: Environmental Tobacco Smoke*, 32 J. FAM. PRACTICE 457, 457 (1991).

<sup>3</sup> Houston, *supra* note 2, at 457.

<sup>4</sup> Osborne M. Reynolds, Jr., *Extinguishing Brushfires: Legal Limits on the Smoking of Tobacco*, 53 U. CIN. L. REV. 435, 437 (1984).

<sup>5</sup> Carrie-Anne Tondo, *When Parents are on a Level Playing Field, Courts Cry Foul at Smoking: Smoking as a Determining Factor in Child Custody Cases*, 40 FAM. CT. REV. 238, 243 (2002).

asthma and 1.3 million visits for coughs, more than 115,000 episodes of pneumonia, 14,000 tonsillectomies and adenoidectomies, 260,000 episodes of bronchitis" and over two million ear problems.<sup>6</sup>

For the last century states across the country have struggled with the smoking debate. As early as 1901 nearly every state had considered antismoking regulations and by 1921 fourteen states had enacted such regulations.<sup>7</sup> However, these regulations were short lived and all antismoking legislation was eliminated by 1927.<sup>8</sup> Reasons for the change ranged from protecting the right to control one's own personal indulgences to a profitable source of tax revenue.<sup>9</sup> At the time, the only known adverse effects from smoking were yellow teeth and smokers' cough.<sup>10</sup>

Today, it is unquestionable that smoking is harmful, not only to the smoker, but also those to who breathe the ETS. Since nonsmokers have been asserting their rights to live and breathe in a smoke free environment "forty-two states in America have banned smoking in public places, forty-four ban smoking in government buildings and twenty-two restrict smoking in private workplaces."<sup>11</sup> Unfortunately, none of these bans protect children from their smoking parents. Many believe that regulation of private homes is beyond the reach of the government, but Judge Robert Julian, a New York Supreme Court judge, has recently extended his power of *parens patriae* by placing a ban on smoking in the New York home of Johnita Dematteo, the first decision of its kind.<sup>12</sup> This article focuses on the repercussions of such a decision and explores whether Judge Julian has taken his powers of *parens patriae* too far.

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 240.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 241.

<sup>11</sup> Brian Williams & Jim Avila, *New York Judge Bans Woman from Smoking if 13-year-old Son Visits Her*, NBC NEWS TRANSCRIPTS, Mar. 26, 2002, available at 2002 WL 3337731.

<sup>12</sup> *Johnita M.D. v. David D.D.*, 740 N.Y.S.2d 811, 813 (N.Y. Sup. Ct., Oneida County 2002).

## FACTUAL & PROCEDURAL BACKGROUND

On August 21, 2001, thirteen-year-old Nicolas Dematteo wrote a letter to the court complaining of maternal smoking during his court ordered visits.<sup>13</sup> Nicholas resides with his father and paternal grandparents and told the judge during an in-camera proceeding that when he visits his mother, she smokes in the bathroom and the entire house smells of smoke.<sup>14</sup> Nicolas further testified to the judge that his mother, Johnita Dematteo, also smokes in her car and seeks a court ruling that he not be exposed to second-hand smoke while visiting.<sup>15</sup>

At the conclusion of the in-camera proceeding the court ordered Johnita to stop smoking in Nicholas' presence *pendente lite* and a hearing on the issue was held.<sup>16</sup> During the hearing, Johnita testified to the fact that she smoked while residing in the marital residence and continues to do so in her separate apartment, noting however that the indoor smoking occurs primarily in the wintertime.<sup>17</sup> All the parties concede that the father, David Dematteo, and Nicholas' grandparents do not smoke and, in fact, smoking does not occur in Nicholas' primary residence.<sup>18</sup> Perhaps the most significant fact is that Nicholas is not currently asthmatic or diagnosed with any presently diagnosed condition associated with ETS.<sup>19</sup>

By taking judicial notice of scientific evidence, the court held that ETS poses a sufficient risk to Nicholas.<sup>20</sup> The scientific evidence offered classified ETS as a Type A carcinogen, killing thousands of non-smokers annually.<sup>21</sup> The court took further

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<sup>13</sup> *Id.* at 813. (The court does not use the family's last name in the decision, but the case was highly publicized and the last name was used in related news articles).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (*Pendente lite* translated means pending the suit).

<sup>17</sup> *Johnita M.D.*, 740 N.Y.S.2d at 813.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 817.

<sup>20</sup> *Id.* at 822-23.

<sup>21</sup> *Johnita M.D.*, 740 N.Y.S.2d at 819.

judicial notice of the fact that children are hospitalized more during their first year of life for bronchitis and pneumonia if they have parents who smoke<sup>22</sup> and that ETS can cause or exacerbate asthma and various other respiratory problems.<sup>23</sup>

This judicial notice then allowed the court to use its power of *parens patriae*<sup>24</sup> to propose a ban that prohibits Nicholas' parents from smoking or allowing others to smoke at any time in their homes or automobiles because ETS increases the risk that Nicholas will develop certain chronic respiratory problems.<sup>25</sup> In New York, parents of children with asthma were historically banned from smoking, but usually only in the child's presence.<sup>26</sup> This is an unprecedented decision because for the first time in United States history a court has proposed that a parent is not allowed to smoke at anytime in the house or automobile because of the effects this might have on her healthy child.<sup>27</sup> The court ultimately proposed a decision granting Nicholas' motion for a smoke-free environment and gave the parties thirty days to refute or contest the scientific evidence.<sup>28</sup> If a hearing was not requested, the order would become final.<sup>29</sup>

## ANALYSIS

The central issue in this case was whether the court could order a smoke-free environment for the child under the circumstances of the case.<sup>30</sup> As stated above, this issue was answered in the affirmative. The court begins its analysis by acknowledging, "visitation is the joint right of both the non-

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 820.

<sup>24</sup> *Id.* at 813.

<sup>25</sup> *Id.* at 818.

<sup>26</sup> *Johnita M.D.*, 740 N.Y.S.2d at 816-17.

<sup>27</sup> *See id.* at 817.

<sup>28</sup> *Id.* at 822.

<sup>29</sup> *Id.* at 823.

<sup>30</sup> *Id.* at 812 (The other two issues in the case, but not discussed above at length, were whether ETS poses a sufficient risk to the child and whether the court could take judicial notice of certain scientific evidence to determine the risk. Clearly, both of these issues were also answered in the affirmative by the court.)

custodial parent and the child” and “in visitation disputes...the best interests of the child is the controlling factor.”<sup>31</sup> As such, the court is able to use its power of *parens patriae* (parent of the country) to “put himself in the position of a ‘wise, affectionate, and careful parent’ and make provision for the child accordingly.”<sup>32</sup> The state has always had this power, but it “has not displaced the parent in right or responsibility.”<sup>33</sup> However, where there is a conflict, the best interest of the child is “superior to the right of parental custody.”<sup>34</sup>

Although the doctrine of *parens patriae* plays an important societal function of protecting the children of America, the real issue in this case is whether courts have extended their reach too far to protect the children, thus infringing upon the rights of the natural parents. More specifically, is this a prudent decision or an abuse of sound discretion? In answering this question, a number of legitimate legal and social policy concerns arise.

On the one hand, many would argue that this is an unwise and unreasonable exercise of power by the courts. In fact, since 1979, Goldstein, Freud and Solnit have believed that parent-child relationships should “not be plagued by the never-ending threat of disruption by the impersonal authority of the court.”<sup>35</sup> While some would see this as an extreme view, it seems that it holds quite a bit of truth in the case at hand. Johnita is currently in the danger of being hauled back into court at any moment, which in and of itself creates a number of other problems.

At the present time the only monitoring mechanism is Nicholas and it is very easy to see how he could use this “power” as a leverage tool to manipulate his mother. For example, if Nicholas is denied permission to attend a party he could very easily tell his mother that if he is not allowed to attend then he will

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<sup>31</sup> *Id.* at 813.

<sup>32</sup> *Id.* at 813-14 (quoting *Queen v. Gynghall*, 2 Q.B. 232 (U.K. C.A. 1893) (the child was removed permanently from the custody of her mother because she was not in the position to adequately care for the welfare of the child)).

<sup>33</sup> *Johnita M.D.*, 740 N.Y.S.2d at 814.

<sup>34</sup> *Id.*

<sup>35</sup> JOSEPH GOLDSTEIN & ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* 118 (rev. ed. 1979).

tell the court that she has been smoking. This seriously undermines parental authority and leaves the mother in a difficult position.

In addition to monitoring, another important problem that the court failed to address is enforcement mechanisms. What happens if Johnita *does* smoke in her house or car? Seemingly, she could be charged with contempt of court, have to pay a fine, serve jail time, or perhaps the most likely punishment is that visitation could be denied. Denying a "fit" parent visitation runs counter to that parent's fundamental right to raise their child. It certainly cannot be argued that protecting America's children is not a compelling government interest, but conversely it is debatable whether a total smoking ban is narrowly tailored to meet that goal. Many would agree that there are less restrictive ways to protect children from ETS. For example, Johnita could clean the house before Nicholas came to visit or run a fan to dissipate the smell.

Another important public policy concern of those that oppose the decision in *Johnita M.D.* is the "slippery slope" argument, implying there is no clear place to draw the line at where the power of the court will stop. Children face a wide array of risks everyday. Will the courts next be forbidding parents to serve their children red meat or put butter on their vegetables or even deny custody because some parents live in dangerous neighborhoods?<sup>36</sup> The answer is probably not, yet all of the above pose potentially dangerous threats to children.

Alternatively, others see this proposed decision as a step in the right direction. Courts have historically stepped in to protect children from all sorts of dangers and, as time progresses, the court needs to address the current dangers, ETS being one of these. ETS and smoking in general is certainly not a new phenomenon and the courts have been dealing with the issue for over a century. In 1904, a woman was sentenced to thirty days in jail for smoking in front of her children, though there was very little known about the side effects of smoking.<sup>37</sup>

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<sup>36</sup> See Merrill Sobie, *Second Hand Smoke and Child Custody Determinations – A Relevant Factor or a Smoke Screen?* 18 PACE L. REV. 41, 43-44 (1997).

<sup>37</sup> Tondo, *supra* note 5, at 238.

As the decades passed and more risks were discovered the court again used its power to protect the children. In 1988, the Supreme Court of New York, Nassau, issued a temporary restraining order prohibiting a mother from smoking in front of her children,<sup>38</sup> who suffered respiratory problems.<sup>39</sup> Similarly, in 1989 the Texas Court of Appeals awarded custody of the parties' child to the non-smoking father, despite the fact that the mother was the primary caretaker.<sup>40</sup> Although the courts have only made such decisions when presented with unhealthy children, new studies show that healthy children are put in great danger when exposed to ETS. With new scientific studies, judges may feel justified in making the decision to ban smoking from the home and car because it is continuing to do what it has traditionally done: keep the children safe from harm.

A final point to be made is the danger a decision such as this could have on intact families, if in fact this principle would be applied that broadly. This smoking ban would place a great strain on families and could become the cause of marital turmoil. Not to mention what the court is left to do when both parents smoke. One option would be to remove the child from the home, but naturally this would create a huge overpopulation in the foster care system and it is still left to be determined whether exposure to ETS can really rise to level of child abuse and neglect. Micro managing families is not a job for the court.

## CONCLUSION

The courts power of parens patriae is certainly an important one, but it is also one that must be clearly defined. As seen in *Juanita M.D.*, Judge Julian left a number of unanswered questions with this decision and, as such, this decision is especially dangerous. While ETS is very hazardous to nonsmokers, and especially children, a total ban with unclear parameters is not a sound decision. Children should be protected, but that protection

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<sup>38</sup> *Roofeh v. Roofeh*, 525 N.Y.S.2d 765, 769 (1988).

<sup>39</sup> *Id.* at 766.

<sup>40</sup> *Pizzatola v. Pizzatola*, 748 S.W.2d 568, 569 (Tex. Ct. App. 1988).



should be balanced with the parents' individual freedoms and right to privacy, especially in the absence of evidence that the child is especially vulnerable to second-hand smoke. The courts should remain mindful of the old maxim that "an ounce of prevention is worth a pound of cure," but that such prevention should be explicitly tailored to meet the problem.